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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 In the Matter of:

Supreme Court No. R-20-0031

12 **PETITION TO AMEND THE**
13 **ARIZONA RULES OF CRIMINAL**
14 **PROCEDURE**

15 **COMMENT OF**
16 **THE ARIZONA PROSECUTING**
17 **ATTORNEYS' ADVISORY**
18 **COUNCIL**

19 **I. BACKGROUND OF PETITION**

20 The Arizona Voice for Crime Victims ("AVCV") has filed a new petition¹
21 relating to Rule 39, Arizona Rules of Criminal Procedure. As in previous petitions,
22 AVCV is seeking to integrate existing victims' rights provisions from the Arizona
23 Constitution and its implementing legislation into each applicable rule throughout
24 the Rules of Criminal Procedure. However, in sharp contrast to its previous
25 petitions, AVCV is no longer seeking the full repeal of existing Rule 39 ("Victims'
Rights").

¹ Similar petitions were filed in R-18-0001 and R-19-0016.

1 The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") has again
2 considered the AVCV petition and its proposed changes and supports them.
3 Integrating victims' rights into the various criminal rules will have a significant
4 impact on how the rights of crime victims are ensured and protected in our criminal
5 justice system. At the same time, not repealing Rule 39 will enhance continued
6 understanding and knowledge of victims' rights throughout the criminal justice
7 system.
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10 **II. DISCUSSION/ANALYSIS**

11 Arizona voters in 1990 approved Prop 104 amending the Arizona Constitution
12 to add a Victims' Bill of Rights ("VBR"). Ariz. Const. art. 2, § 2.1. The next year,
13 the Victims' Rights Implementation Act was passed by the Legislature, codified as
14 A.R.S. §§ 13-4401 *et seq.* Ch. 229, 1991 Ariz. Sess. Laws 1137. For the past 30
15 years, Arizona courts have continued to stress the importance of the VBR in securing
16 crime victims' rights to justice and due process in the criminal justice system. *Z.W.*
17 *v. Foster*, 244 Ariz. 478, ¶ 3 (App. 2018) (the VBR secures crime victims'
18 "important rights" to justice and due process); *See also State v. Patel*, 247 Ariz. 482,
19 ¶ 5 (App. 2019) (addressing a victim's right to restitution under the VBR).
20 Integrating victims' rights throughout the Rules of Criminal Procedure further
21 secures and protects a victim's right to justice and due process in our system.
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1 **A. Non-Repeal of Rule 39**

2 In its previous petitions, AVCV recommended the full repeal of Rule 39.
3
4 However, as it notes (Petition, p. 3), consideration of stakeholder concerns over full
5 repeal has caused it to reconsider that recommendation. APAAC applauds AVCV's
6 new recommendation to keep Rule 39 intact. Rule 39 has long been the recognized
7 and cited source for victims' rights in Arizona. It was the foundation upon which
8 both the VBR and its implementing statutes was based.² Practitioners, advocates,
9 students, and courts have been trained on Rule 39 and have learned to rely upon it.
10 Innumerable appellate decisions have addressed the rule's specific provisions. At
11 this point, a full repeal of Rule 39 would be counterproductive to ensuring and
12 protecting victims' rights. Notably, AVCV has proposed a new rule (39(a)(3)(C))
13 to address any conflict between a specific criminal rule and Rule 39.
14
15 to address any conflict between a specific criminal rule and Rule 39.

16 **B. Suggested Integration Clarifications**

17 As it has in years past, APAAC has identified certain areas of the petition's
18 proposed rule changes for which clarifications are suggested:
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20 1. **New Rule 1.2 (a)(3) ("Victims are not Parties")**

21 In its previous petitions and again here, AVCV has added "*crime victim*" or
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23
24 ² Rule 39 was promulgated by the Arizona Supreme Court on July 24, 1989 and
25 became effective on August 1, 1989. It was the basis upon which Arizona voters
 approved Prop 104 in 1990.

1 “victim’s attorney” to the language of Rule 1.3 (“Computation of Time”), Rule 1.7
2 (“Filing and Service of Documents”), Rule 1.8 (“Clerk’s Distribution of Minute
3 Entries and Other Documents”) and Rule 1.9 (“Motions, Oral Argument, and
4 Proposed Orders”). To address previous concerns that these modifications elevate
5 victims to “party” status, AVCV has proposed a new Rule 1.2(a)(3) to clarify that
6 the suggested modifications should not be construed to make victims parties to a
7 criminal case. (*See also* Petition, p. 6). While this clarification is useful, it should
8 be stressed that a victim’s active participation in making motions and requesting
9 orders in the criminal process is limited to matters that directly involve the victim
10 enforcing a right or challenging the denial of a right. A.R.S. § 13-4437(A); *State ex*
11 *rel. Montgomery v. Padilla*, 238 Ariz. 560, ¶ 22 (App. 2015).

15 2. Rule 15.1 (“The State’s Disclosures”)

16 AVCV again proposes limitations on a court’s ability to order disclosure by
17 the State on motion of a defendant. Proposed Rule 15.1(g)(1) would allow a court
18 to order disclosure by the State, on a defendant’s motion, from any person “*other*
19 *than the victim*”. As APAAC noted in previous comments, a victim’s right to refuse
20 a discovery request by a defendant under the VBR may sometime yield to federal
21 and state constitutional mandates of due process entitling a defendant to a fair trial.
22 *State e rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 240 (App. 1992).

23 The *Roper* decision was recently analyzed and softened by Division One in
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1 *R.S./S.E. v. Thompson in and for County of Maricopa*, 247 Ariz. 575 (App. 2019),
2 in which the Court granted relief from a superior court ruling requiring the State to
3 produce the victim's privileged mental health records for an in camera review. But
4 the Court resolved the issue based on the statutory physician-patient privilege and
5 did not reach the superior court's ruling regarding the VBR. *Thompson*, ¶ 9. And
6 the Court agreed with *Roper* that "when a defendant's established due process right
7 directly conflicts with a non-federal constitutional right, the due process right must
8 prevail." *Thompson*, ¶ 21. APAAC again suggests that the AVCV proposed
9 language be modified to state "*other than the victim, absent a determination by the*
10 *court that the evidence would be exculpatory.*"

14 3. Rule 16.3 ("Pretrial Conference")

15 Rule 16.3 allows the court to set evidentiary hearings and pretrial conferences.
16 AVCV also proposes, as it did in previous petitions, to limit a court's ability to set
17 evidentiary hearings and pretrial conferences unless "*the rights and views of the*
18 *victim, the victim's right to a speedy trial, and the victim's right to be present at all*
19 *proceedings*" have been considered. Proposed Rule 16.3(d)(2). The court's ability
20 to set evidentiary hearings and pretrial conferences, which are generally ministerial
21 and determined by a court's docket, should not be hampered by the addition of the
22 proposed language. Instead, APAAC suggests that if a change to Rule 16.3(d) is
23 necessary to protect victims' rights, the proposed modification should be clarified to
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1 apply only to motions to continue these hearings, as provided in A.R.S. § 13-
2 4435(F).

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4 4. Rule 16.4 (“Dismissal of Prosecution”)

5 Rule 16.4(a) allows the court to dismiss a prosecution without prejudice on
6 the State’s motion and for good cause. AVCV again proposes adding a requirement
7 to this section that the court could only dismiss for good cause on motion of the State
8 “*after considering the views of the victim.*” This proposed language inserts the
9 victim into the State’s decision to dismiss a prosecution and the court’s ability to
10 grant it. Fairly read, this proposal could give a victim the right to object to a
11 dismissal by the State. This is not something that currently exists in the VBR or its
12 implementing statutes.
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15 APAAC has previously pointed out that a victim has the right, upon request,
16 to confer with the prosecution about a dismissal (A.R.S. § 13-4419(A)), but that right
17 does not extend to having the court deny a dismissal if the victim objects. A
18 prosecuting attorney must be free to decide which cases to pursue or not, and the
19 case law is clear that a prosecutor has broad discretion to prosecute cases “regardless
20 of the wishes of the victim.” *State v. Granados*, 172 Ariz. 405, 408 (App. 1991);
21 *State v. Peltz*, 242 Ariz. 23, ¶ 8 (App. 2017) (“[t]he prosecutor has broad discretion
22 in deciding both whether to charge and which charges to file against a defendant.”).
23
24 A victim has no authority to direct the prosecution of a case. A.R.S. § 13-4419(C).
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1 APAAC recommends that if the proposed modification is to be adopted, it should be
2 amended to read "*after determining that the victim has conferred with the*
3 *prosecutor.*"

4
5 **III. CONCLUSION**

6 The Arizona Prosecuting Attorneys' Advisory Council recognizes and
7 commends the work of the AVCV in its continuing efforts to enhance and protect
8 victims' rights in Arizona. APAAC offers the suggestions in this comment with the
9 intent of strengthening the proposed changes as set forth in AVCV's petition.
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11 RESPECTFULLY SUBMITTED this 1st day of April, 2020.

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13 
14 Elizabeth Burton Ortiz, #012838
15 Executive Director
16 Arizona Prosecuting Attorneys'
Advisory Council

17 Electronic copy filed with the
18 Clerk of the Arizona Supreme Court
19 this 2nd day of April, 2020.

20 By: 
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